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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LEWIS PASCHALL,

Defendant and Appellant.

B214419

(Los Angeles County
Super. Ct. No. YA072154)

APPEAL from a judgment of the Superior Court of Los Angeles County, John V. Meigs, Judge. Affirmed in part and reversed in part.

G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant David Lewis Paschall appeals from the judgment entered after a jury convicted him of simple assault, a lesser included offense of assault by means likely to produce great bodily injury, and battery causing serious bodily injury. Defendant contends the trial court erred by failing to dismiss his conviction of simple assault as a lesser included offense of aggravated battery. We conclude the simple assault conviction must be reversed because it is a necessarily included offense of aggravated battery, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Charges

Defendant was charged by information with assault by means likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1), count 1) and battery causing serious bodily injury (§§ 242, 243, subd. (d), count 2). The information specially alleged as to count 1 that defendant had personally inflicted great bodily injury (§ 12022.7, subd. (a)), and, as to both counts, that defendant had served a separate prison term for a felony (§ 667.5, subd. (b)).

B. The Jury Trial

According to the People's evidence, on April 7, 2008, defendant was working at an Alamo Rental Car agency in Los Angeles. Levorn Moses (Moses), defendant's supervisor, noticed three vans were improperly parked and told defendant they needed to be parked correctly. Defendant refused. Moses insisted that defendant move the vans. When Moses turned to walk away, defendant struck Moses in the jaw. The punch rendered Moses unconscious. When Moses collapsed, his head struck the ground with

¹ All further statutory references are to the Penal Code.

such force that he suffered injuries to his brain. Moses remained hospitalized in intensive care for five days, underwent physical therapy, and was still unable to work at the time of trial.

Defendant testified in his own defense that Moses had approached him in a hostile and aggressive manner to the point where defendant felt threatened, so defendant struck him.

C. Jury Verdict and Sentencing

The jury found defendant not guilty of assault by means likely to produce great body injury, but guilty of the lesser-included offense of simple assault (§§ 240, 241, subd. (a), count 1). The jury also convicted defendant of battery causing serious bodily injury (count 2).

Following the verdict, defendant waived his right to trial and admitted the prior prison term enhancement allegation.

The trial court sentenced defendant to the three-year middle term for aggravated battery, stayed the sentence for simple assault under section 654 and dismissed the prior prison term enhancement in furtherance of justice (§ 1385).

DISCUSSION

Defendant's conviction of simple assault as a lesser included offense of aggravated assault charged in count 1 was based on his act of punching Moses in the face, thereby causing him to fall and to suffer a head injury. The same conduct was the basis for defendant's conviction of aggravated battery in count 2. Defendant contends, the People acknowledge, and we agree simple assault is a lesser included offense of battery (see *People v. Lewis* (2008) 43 Cal.4th 415, 518; *People v. Colantuono* (1994) 7 Cal.4th 206, 216-217) and multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) Thus, the conviction on count 1 should be reversed.

DISPOSITION

The judgment of conviction on count 2 for battery causing serious bodily injury is affirmed and the conviction on count 1 for simple assault is reversed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.